No. 02-743

Supreme Court, U.S.
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In The

# Supreme Court of the United States

DAVID McMAHON,

*Petitioner,*

v.

ALBANY UNIFIED SCHOOL DISTRICT, JOE DALE HUDSON, ALAN RIFFER, DIANNE McNENNY, MARSHA SKINNER, and PEGGY THOMSEN,

*Respondents.*

**On Petition For Writ Of Certiorari To The California Court Of Appeal**

## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### I.

### DUE PROCESS OF LAW REQUIRES THAT AN APPELLATE COURT GIVE THE PARTIES NOTICE AND AN OPPORTUNITY TO BE HEARD ON AN OUTCOME-DETERMINATIVE ISSUE IN THE CASE. IT IS IRRELEVANT TO THAT PARTICULAR DUE PROCESS PRINCIPLE WHETHER THE RECORD SUPPORTS THE APPELLATE COURT'S DECISION.

We argued in our petition for certiorari that the California Court of Appeal decided the case on an issue that was not briefed or argued by the parties.

Respondents deny that the California Court of Appeal did this at all. They claim that as long as the California appellate court reviewed the summary judgment order *de novo*, the court was not "restricted to the issues identified by Petitioner in his appellate brief." Respondents' Brief in Opposition, p. 1.

The reasoning behind respondents' argument is not clear, to say the least. Presumably, *any* case that an appellate court decides on an unbriefed issue contains support in the record for the decision. Otherwise the due process argument would be not that the case was decided on an issue which was not briefed or argued, but that there was no support in the record for the court's decision.

We do not dispute the principle that summary judgment orders are reviewed *de novo*. It is a rule of universal application, because the question on summary judgment is whether the proponent has, as a matter of law, established his or her position. If the issue is a matter of law, then it is not surprising that the standard of review is *de novo*.

But the question which arises in the mind of one who reads respondents' opposition is, what does the standard of review have to do with the case at hand? The issue of the legality of the arrest was not ruled upon, or even mentioned, in the trial court's summary judgment order; hence, the appellate court's "review" of the trial court's order was not a "review" of that issue. That issue was never *determined* by the trial court.

In *Cole v. Arkansas*, 333 U. S. 196 (1948), which we cited in our petition, the defendants were tried and convicted of violating § 2 of a state statute, and they argued on appeal that the statute was unconstitutional. The state supreme court did not address that issue, but instead ruled that the record showed a violation of § 1 of the statute. This court did not look to whether the record contained sufficient evidence to support the finding of such an alternate violation; rather, the question was whether the defendants were entitled to have their appeal appraised "as the issues were determined in the trial court." *Id.* at 202.

When an appellate court decides an issue without telling the parties that it considers the issue to be determinative of the outcome of the case, it means that one of the parties will be deprived of his rights without ever having the opportunity to defend against the appellate court's judgment.

Such a procedure is contrary to due process of law.

Respectfully submitted,

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